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No. 80-1666

IN THE

Supreme Court of the United States

October Term, 1980

JOHN R. LARSON, Commissioner of Securities, Minnesota Department of Commerce; WARREN SPANNAUS, Minnesota Attorney General; Individually and in their official capacities,

Appellants,

vs.

PAMELA VALENTE, LARRY BARBER, LARRY HAFT, KIMBERLY KORMAN, and HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY,

Appellees.

REPLY BRIEF

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Appellees.

REPLY BRIEF

INTRODUCTION

Before addressing the specific arguments of plaintiffs-appellees ("plaintiffs"), two significant points regarding plaintiffs' responsive brief must be noted. First, plaintiffs have abandoned the primary rationale of the Eighth Circuit on the establishment clause issue and the only rationale on the standing issue. With respect to the establishment clause issue, plaintiffs acknowledge that the exemption provision is not the product of impermissible legislative motivation and intention. Plaintiffs explicitly state that intention is not now an issue before the Court. Brief of Appellees at 22-23, 32 n. 12. With respect to the standing issue, plaintiffs have disavowed the Eighth Circuit's determination that the overbreadth doctrine affords them standing to challenge the exemption where injury in fact is not shown. Instead, plaintiffs contend that they are injured in fact by the exemption provision.

Second, plaintiffs have improperly broadened the scope of their arguments to implicate provisions of the Minnesota Charitable Solicitations Act that are not before this Court on appeal. The only portion of the Act before this Court is the exemption provision applicable to religious organizations. Challenges to other portions of the Act must await further proceedings in the lower courts. Similarly, for plaintiffs to demonstrate standing on the issue before this Court, they must demonstrate that any putative injury is caused by the exemption provision.

ARGUMENT

I. THE EXEMPTION PROVISION IS NOT BASED UPON A RELIGIOUS CRITERION.

Surprisingly, plaintiffs adopt the argument that the exemption provision constitutes *de jure* discrimination as their primary basis for urging that the Court find the provision unconstitutional as violative of the establishment clause.[1] Of course, even if the exemption provision is viewed as creating a distinction among religious groups on its face, this would not in itself lead to a finding of unconstitutionality. *Gillette v. United States*, 401 U.S. 437 (1971) (exemption based on particular tenet of religious belief upheld as constitutional).

As will be shown, it is simply incorrect to construe the challenged provision as somehow being tied to any religious criterion. Plaintiffs do not explain how the criterion (solicitation of money from members of an organization compared to solicitation of money from the general public) is a "religion criterion". Nor could they. There is simply nothing religious in this distinction.

Plaintiffs' argument is simply a conclusory statement. According to plaintiffs, the exemption provision is a *de jure* discrimination because on its face it operates to require

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[1] Plaintiffs' argument appears to be based more on equal protection analysis than establishment clause jurisprudence. Developing such an argument here is anomalous, since the gravamen of an equal protection claim is intentional discrimination, *Washington v. Davis*, 426 U.S. 229 (1976), and the Minnesota legislature's intention in enacting the provision is specifically disavowed as a basis for affirmance. Brief of Appellees at 22-23, 32 n. 12. Also, no equal protection issue is properly before this Court since plaintiffs' motion for summary judgment on equal protection grounds was denied by the district court and was not before the circuit court.

registration and financial disclosure from some but not all religious organizations. Having phrased the issue in this manner, the plaintiffs sidestep the fact that the member-donor rationale which forms the basis of the exemption involves no religious criteria.

Simply because a secular criterion appears in an exemption provision applicable to religious organizations does not transform it, as a matter of law, into a religion criterion. The test in establishment clause analysis is whether the underlying criterion is secularly based. *Gillette v. United States*, 401 U.S. 437 (1971), is precisely on point here. The exemption in *Gillette* was attacked on grounds that it benefitted members of some religious organizations and adversely affected members of other religious organizations. However, once the Court determined that the criterion in the exemption was secular in nature, it foreclosed the *de jure* contention. *See also Jaggard v. Commissioner of Internal Revenue*, 582 F.2d 1189 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) (exemption from social security tax for those religious organizations which provide financial support for members' retirement held not *de jure* religious discrimination).

In its program of regulating charitable solicitation for the protection of the public, the State of Minnesota has done no more than utilize a criterion based upon the extent of charitable solicitation from the public. Plaintiffs' *de jure* discrimination argument challenging this criterion simply goes too far. It suggests that government may not use secular, activity-related criteria setting forth the parameters of its regulation of that activity if such criteria cross religious lines. Paradoxically, plaintiffs' espousal of a total religious organization exemption, Brief of Appellees at 19, or a religious purpose exemption, Brief of Appellees at 9, introduces criteria unrelated

to any activity being regulated. Rather, plaintiffs' suggested exemption criteria are grounded in the nature of the organization itself. Measured against "religious neutrality" principles, plaintiffs' suggested exemptions are more constitutionally suspect than is Minnesota's.

II. THE EXEMPTION PROVISION DOES NOT VIOLATE THE LEMON V. KURTZMAN ESTABLISHMENT CLAUSE TEST.

The three-pronged establishment clause test enumerated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and applied by this Court consistently in recent years, is given a secondary position in the Brief of Appellees, and labelled "unnecessary" to resolution of the establishment clause issue. Brief of Appellees at 31. As noted above, the primary rationale of the circuit court was that the exemption provision violates the secular purpose prong of the test. Plaintiffs abandon the circuit court opinion. Brief of Appellees at 32. Also, plaintiffs' "primary effect" discussion is a simple perfunctory paragraph that repeats the argument that there is a *per se* rule that all religious organizations be equally impacted by state regulation. Brief of Appellees at 32-33. This argument is extensively addressed in the Brief for Appellants at 20-26, was rejected in *Gillette v. United States*, 401 U.S. 437 (1971) and *McGowan v. Maryland*, 366 U.S. 420 (1961), and need not be refuted here.

The "excessive entanglement" prong of the *Lemon v. Kurtzman* test was not addressed by the circuit court, 637 F.2d 562, 569, Joint Appendix at A-143, but is discussed at length by plaintiffs. Brief of Appellees at 33-36. However, this discussion is not confined to the exemption provision which is the sole provision before this Court.

The only issue before the Court is the constitutionality of the exemption provision. Thus, in order for plaintiffs to succeed in their entanglement argument, they must make some showing that this exemption (and not other provisions of the Act) excessively entangles government and religion. Instead of limiting the discussion to the provision before this Court, plaintiffs attack the Act as a whole. Brief of Appellees at 34-36. Thus, their argument involves the state's subpoena and investigative powers, Brief of Appellees at 34, limitations on excessive fund raising expenses, *id.* at 35-36, and even the registration revocation provision of the Act, a provision expressly found non-justiciable by the district court on summary judgment. Jurisdictional Statement at A-19. Since the inquiry here concerns only the exemption provision, reliance on these provisions is inappropriate.[2]

More fundamentally, plaintiffs' argument is misplaced since it concerns free exercise clause and not establishment clause considerations. The entanglement argument shifts the inquiry by concentrating only on the organizations making

[2] To the extent plaintiffs' primary contention is unequal treatment of religious organizations, reference to other provisions of the Act is inappropriate also. The circuit court found that all provisions of the Act except registration and disclosure apply identically to all religious organizations. 637 F.2d at 570; Joint Appendix at 144-45.

disclosure (non-exempt organizations). Thus, establishment clause analysis is brought to bear on what is essentially a regulatory program. Implicit in plaintiffs' entanglement argument is the proposition that the religious organizations which engage in an activity regulated by the state are unconstitutionally "established by regulation." The proposition is a contortion of language and would cause the free exercise clause test to be engulfed by the entanglement prong of the establishment clause test. Thus, plaintiffs' entanglement argument should be rejected as an attempt to introduce a free exercise issue where it was not passed on by the courts below. *See generally EEOC v. Southwestern Baptists Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (information required concerning nonministerial employees); *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir. 1980) (information required under Internal Revenue Code).

In fact, the system of disclosure in Minnesota's law is structured to minimize government contact with charitable organizations while effectuating the governmental objectives. The mechanics of the disclosure process are described in the Brief for Appellants at 6-9. After an initial registration containing information which is specifically set out by statute, Minn. Stat. § 309.52, subd. 1(a)-(p), annual financial statements are required. The content of the financial statement is also specified in the statute. Minn. Stat. § 309.53. Statements are prepared by the organization itself and accountants selected by the organization itself, and not by the state. The statute specifies that generally accepted accounting principles govern as to preparation. Minn. Stat. § 309.53, subd. 3. There is no requirement that statements be verified by state officials, or formally "approved" as to content.

Thus, the government contact with charitable organizations is limited in this process. It is much more limited, for example,

than it would be were the state forced to rely on its investigative and enforcement powers in civil and criminal fraud proceedings. Plaintiffs' broad entanglement argument would remove charitable solicitation even from the criminal process. However, the excessive entanglement test does not provide a shield behind which religious organizations can act with impunity and in disregard of civil and criminal laws. *See United States v. Holmes*, 614 F.2d 985 (5th Cir. 1980); *Securities & Exchange Comm'n v. World Radio Mission*, 544 F.2d 535 (1st Cir. 1976); *In re Rabinical Seminary*, 450 F.Supp. 1078 (E.D.N.Y. 1978).

Recognizing this, much more direct governmental involvement has been acknowledged not to constitute "excessive entanglement." A detailed inquiry into a religious organization's activity is permissible to determine whether the organization qualifies for tax exemption even where the inquiry includes a determination of whether the organization's activity is secular or religious as long as it "does not entail judicial inquiry into dogma and belief." *Walz v. Tax Commission*, 397 U.S. 664, 697 n. 1 (1970) (Harlan, J., separate opinion). Similarly, in *Committee for Public Education v. Regan*, 444 U.S. 646 (1980), educational officials from the State of New York were required to periodically inspect the records of religious organizations operating schools. State officials mandated accounting methods, audited vouchers, and in the appropriate case, forced repayment of state funds. The resulting relationship was held not to be excessive entanglement. 444 U.S. at 660-61. *See also Tilton v. Richardson*, 403 U.S. 672 (1971) (on-site inspections by government officials to determine whether federally-funded construction projects were put to impermissible sectarian uses by religious organizations held not excessive entanglement); *Smith v. Board of Governors of University of North Carolina*, 429 F.Supp. 871 (W.D. N.C. 1977), *aff'd mem.*, 434 U.S. 803 (1977).

III. PLAINTIFFS' ARGUMENT THAT THE EXEMPTION PROVISION IS NOT SUBSTANTIALLY RELATED TO A SIGNIFICANT GOVERNMENTAL INTEREST IS NOT A PART OF THE ESTABLISHMENT CLAUSE INQUIRY AND IS, IN ANY EVENT, INCORRECT.

Without discussion as to relevance, plaintiffs also suggest that this Court invalidate the exemption provision under the establishment clause on the grounds that it purportedly "is not substantially related to a significant governmental interest". Brief of Appellees at 23. This line of argument is deficient in at least three respects. First, plaintiffs' "substantially related to a significant governmental interest" test has never been an aspect of establishment clause analysis. Plaintiffs simply postulate this test without discussion and without citation to authority suggesting such an inquiry even remotely relates to establishment clause principles. The proper inquiry is the one found in *Gillette v. United States*, 401 U.S. 437 (1971), specifically, whether the claimant can show "the absence of a neutral secular basis for the lines the government has drawn". 401 U.S. at 452. The challenged provision easily survives this test.

Second, plaintiffs' argument, even if accepted as relevant to establishment clause analysis, does not accomplish what it purports to accomplish. Plaintiffs do not and cannot dispute the importance of the state's interest in charitable solicitation. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Thus, their significant governmental interest test reduces to the claim that the exemption is either under or over inclusive in accomplishing this purpose.

Their argument is replete with suggestions as to how the Minnesota law might have been alternately drafted.[3] Again, however, there is no discussion of why this inquiry is at all relevant to the establishment clause challenge, particularly in light of the fact that even plaintiffs acknowledge the statute comports with at least minimal constitutional standards. Brief of Appellees at 23 (acknowledging the statute has a "rational basis"). Plaintiffs would apparently have this Court rewrite the provision in accordance with plaintiffs' legislative proposals. It is axiomatic, however, that this is not the function of the judiciary. *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

Third, plaintiffs have not even demonstrated that the exemption is substantively under or over inclusive. Indeed, plaintiffs' criticisms of the exemption provision are minor. For example, plaintiffs discuss at length the fact that the exemption could have been drawn along lines of total dollars solicited from the general public, as is the exemption in Minn. Stat. § 309.515, subd. 1(a), rather than on a percentage basis. This is a possible alternative but is by no means a clear improvement. Both percentage and dollar criteria succeed in identifying those charitable organizations undertaking significant solicitation activity from the general public, and

[3] ". . . The State could re-write the Act to grant the exemption to all religious organizations; it could grant the exemption to no religious organizations; or it could eliminate the religion criterion entirely by treating religious organizations no differently from all other charitable organizations." Brief of Appellees at 19. Plaintiffs take no position on whether any of these alternatives are constitutional under the religion clauses. The constitutionality of another suggestion (exemption for religious organizations 100 percent internally funded) is expressly disclaimed although it is "obviously more defensible" than the provision as legislated. Brief of Appellees at 28 n. 11.

both criteria have been adopted by the Minnesota legislature in the charitable solicitation law.[4] But it is no argument to say that one criterion is not substantially related to a governmental interest simply because another supplemental criterion could be advanced as well.

Plaintiffs also attempt to belittle the importance of the exemption's member/non-member distinction. Apparently forgetting that on their motion for summary judgment, factual inferences must favor defendants, plaintiffs suggest that this Court infer that the state has "overestimated" the protections inherent in the member-donor context. However, the right of a member to inspect books and records is provided by statute and is recognized in common law.[5] The right is available to a member-donor, whether or not the member-donor chooses to exercise it. It is not available to general public donors.

Moreover, defendants do not rely exclusively on statutory and common law membership rights to information to justify the exemption criterion. Defendants rely on the general prop-

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[4] As explained in defendants' brief, other exemption provisions may apply to religious organizations not exempted by the challenged provision. Thus, there is both the percentage-based exemption applicable to religious organizations, Minn. Stat. § 309.515, subd. 1(b), and a dollar-based exemption available to religious organizations, Minn. Stat. § 309.515, subd. 1(a). See Brief for Appellants at 11-12.

[5] *See* H. Oleck, Non-Profit Corporations, Organizations and Associations 395 (4th ed. 1980). Plaintiffs note that not all religious charitable organizations are incorporated under Minnesota's Non-Profit Corporation Act, which contains an explicit statutory right in members to inspect the books and records of the corporation. Minn. Stat. § 317.28, subd. 3. Religious organizations may also incorporate under Minnesota Statutes, chapter 315, which contains no such explicit authorization. However, membership inspection rights have never been determined in Minnesota for chapter 315 corporations, and Minnesota courts may well decide that such a right is implicit or is contained in common law, as other state courts have done. *See* Oleck, *supra*.

osition that donors who are members of an organization are in a much better position to inform themselves about their organization (and judge the accuracy of the representations made at the time of solicitation) than are donors who are strangers to the organization. This is especially true where contributions are solicited through such sophisticated techniques as those noted by one of the *amicus* here: "Radio, television, door-to-door, and direct mail solicitation . . ."[6] Defendants' proposition has not been disputed by any factual presentation.

As defendants have argued previously, the state's interest in any particular organization making public disclosure is directly related to the extent of the organization's solicitation from the general public. When the donors are members who can inform themselves about the organization, the state's asserted interest in disclosure diminishes. On the other hand, the state's interest increases as general public solicitation increases, and is strongest where all donors are strangers to

[6] Brief of the General Conference of Seventh Day Adventists of the National Council of Churches of Christ in the U.S.A., and of the Baptist Joint Committee on Public Affairs, *Amicus Curiae*, in support of Appellees at 2. The provision is question relates to providing information to preclude successful misrepresentation. The issue is not control of representations or expenditures of funds, although members intrinsically have greater control over these activities than does the public at large.

the organization.[7] Since a spectrum of strength of governmental interest is present, a number of possible lines of distinction are possible. Defendants have demonstrated that drawing the exemption line at the point where the organization relies more on strangers than on members is a reasonable legislative judgment and indeed is the most logical and compelling point at which to draw the line. Brief of Appellants at 27-30. Absent illicit motive, no more rigorous test is appropriate.[8] Thus, even under plaintiffs' test, the statute is constitutional.

Since the membership criterion is not religious, is substantially related to an important state interest, and has not been drawn unreasonably, there is no constitutional defect.

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[7] It is not correct to say that Minnesota is unique in requiring financial disclosure by religious organizations depending upon the criterion of the extent of general public solicitation. Brief of Appellees at 1 n. 1. The State of Maine exempts religious organizations from disclosure "except to the extent that the organization engaged in the solicitation of funds or sales of goods or services to the general public by means of advertisements, personal contacts, mailings or telephone contacts." Me. Rev. Stat. tit. 9, § 5006, subd. 1(B). Maryland exempts religious organizations from registration "if they do not employ a professional solicitor to solicit funds on their behalf or if they do not mail out more than 500,000 solicitations for charitable contributions in any one year." Md. Ann. Code art. 41, § 103C(a)(6). Thus, at least three states, and North Carolina before its statute was voided in *Heritage Village Church and Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 263 S.E.2d 726 (1980), tailor their exemptions along the lines reflecting the extent of solicitation activity directed at the general public.

[8] "We hold that the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn, and it follows as a more general matter that *the line is neither arbitrary or invidious.*" *Gillette v. United States*, 401 U.S. 437, 449 n. 14 (1971) (emphasis added).

IV. PLAINTIFFS LACK STANDING TO CHALLENGE THE EXEMPTION PROVISION.

In the Brief of Appellees, plaintiffs abandon the rationale of the Eighth Circuit supporting the holding that plaintiffs have standing to have the establishment clause issue adjudicated on summary judgment. Plaintiffs acknowledge now that they must satisfy the "injury in fact" test. Brief of Appellees at 36-38. *See Warth v. Seldin*, 422 U.S. 490 (1975).

This Court has recently described the proper inquiry:

> . . . This requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin*, 422 U.S. 490 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

Duke Power Co. v. Carolina Environ. Study, 438 U.S. 59, 72 (1978). The "injury in fact" determination implicates the judicial power under the constitution. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

Neither the district court nor the circuit court found that plaintiffs were a religious organization and members thereof. Plaintiffs acknowledge this. Brief of Appellees at 37 n. 14. The only issue before the Court is the constitutionality of the exemption relating to religious organizations. Unless and until it is determined that plaintiffs are a religious organization and its members, the unidentical impact of the exemption provision for religious organizations cannot be shown to work the "distinct and palpable injury" on plaintiffs which the constitution requires as a prerequisite to invocation of

judicial power. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Similarly, the determination that the exemption provision is constitutional, which plaintiffs seek here, will not serve to redress any injury plaintiffs suffer. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

Plaintiffs present two additional arguments. First, plaintiffs argue that their mere allegation that they are a religious organization and members thereof is itself sufficient to confer standing to have the establishment clause issue adjudicated. Brief of Appellees at 36. The cases cited by plaintiffs that focus solely on the allegations do so because they arise in the procedural context of a defendant's motion to dismiss. *See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975). However, where the allegations of injury are sufficient to survive a dismissal, the burden remains on plaintiff to support the allegations with evidence. Failure to do so requires dismissal following trial. As the Court recently stated in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31 (1979):

> Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial.

See also Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 37 n. 15 (1976); *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 526 (1st Cir. 1979). Clearly, plaintiffs' mere allegations are insufficient at this stage of the proceedings, since the matter is here pursuant to a motion for summary judgment which is a proceeding on the merits and not on the sufficiency of the complaint. If plaintiffs' argument

were correct, few cases would be dismissed for lack of standing since any prudent pleader would allege harm knowing that no factual support for the allegations would be required.

Plaintiffs' other argument is that they were injured by other provisions of Minnesota's charity law, and thus can challenge any provision of that law. Brief of Appellees at 37-38. In *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), the Court held that not only must injury be shown but also that the injury "fairly can be traced to the challenged action of the [state]." 426 U.S. at 41-42. In this case, the action challenged is enactment of the exemption provision. Whatever injury plaintiffs may suffer from other provisions of the Act cannot satisfy the standing requirement as to the exemption provision. There is no standing if "the exercise of the Court's remedial powers would [not] redress the claimed injuries." *Duke Power Co. v. Carolina Environ. Study*, 438 U.S. 59, 74 (1978). Thus, if the injury results from other provisions of the Act, a decision by this Court on the exemption provision will not redress the injury.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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